JEREMY M. JACOBS & MARGARET J. JACOBS
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 19009-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PRETRIAL MEMORANDUM

Trial Calendar Special Session: Washington, DC
Date: 07-18-16

PRETRIAL MEMORANDUM FOR RESPONDENT

NAME OF CASE: | **Docket No.**

Jeremy M. Jacobs and
Margaret J. Jacobs
v. Commissioner | 19009-15

ATTORNEYS:

Petitioners:
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Respondent:
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AMOUNTS IN DISPUTE:

Tax Year	Deficiency
2009	$ 45,205.00
2010	$ 39,823.00

STATUS OF CASE:

Probable Settlement__ Probable Trial___ Definite Trial_X

CURRENT ESTIMATE OF TRIAL TIME: 1.5 DAYS

STATUS OF STIPULATION OF FACTS: Completed ___ In Process _X_

ISSUES:

1. Whether the petitioners' business expenses for pre-game meals provided to their professional hockey team at away city destinations are excepted from the 50% limitation of § 274(n)(1) as a de minimis fringe because the business operates an eating facility for the team at the away city hotels as provided in I.R.C.§ 132(e)(2).

a. Whether the petitioners have substantiated that the applicable conference rooms at away city hotels wherein game day meals are provided constitute eating facilities pursuant to the statute.

b. Whether the petitioners have substantiated that their business contracts for the operation of eating facilities at the away city hotels.

c. Whether the petitioners have substantiated that their business leases eating facilities at the away-city hotels.

d. Whether the eating facilities allegedly operated by petitioners' business is located on or near petitioners' business premises.

e. Whether the revenue derived from the operation of an eating facility by petitioners' business equals or exceeds the direct operating costs of such facility.

2. a. Whether the value of the pre-game meals may be excluded from the employees' gross income because the provision of such meals is done for the convenience of the petitioners' business as provided by I.R.C. § 119.

b. Whether the value of the pre-game meals may be excluded from the employees' gross income because the provision of such meals is done on the business premises of the petitioners.

c. Whether the value of the pre-game meals may be excluded from the employees' gross income because more than half of the employees to whom the meals are furnished are furnished such meals for the convenience of the employer.

3. Whether the provision by petitioners' business of the pre-game meals to its professional hockey team impermissibly discriminates in favor of highly-compensated employees.

4. Whether the expenses for pre-game meals provided by petitioners' business to its employees at away city destinations are excepted from the 50% limitation of § 274(n)(1) as a de minimis fringe because the value of such meals is so small in relation to the frequency of its provision as to make accounting unreasonable or administratively impracticable as provided in I.R.C. § 132(e)(1).

5. Whether the expenses for pre-game meals provided by petitioners' business to its employees at away city destinations are excepted from the 50% limitation of § 274(n)(1) as an expense for goods and services which are sold by petitioners' business in a bona fide transaction for an adequate and full consideration.

6. Whether the petitioners' Schedule A, Itemized Deductions, for their 2009 taxable year are $1,321,312 as limited by petitioners or $1,317,763 as determined by the Commissioner.

WITNESSES RESPONDENT EXPECTS TO CALL AT TRIAL:

1. Jill A. Milligan, Revenue Agent, IRS:LB&I, Buffalo, NY. Ms. Milligan is expected to testify regarding her investigation, preparation, and verification of three (3) summary exhibits.

SUMMARY OF FACTS:

Petitioners

During the years 2009 and 2010, petitioners Jeremy M. Jacobs and Margaret J. Jacobs were the sole shareholders of Deeridge Farms Hockey Association, an S Corporation ("Deeridge"). [First Stipulation of Facts ("Stip.") Paragraph 4] Deeridge was the sole owner of the Boston Professional Hockey Association, Inc., ("BPHA"). (Stip. ¶13) BPHA was a Massachusetts corporation, and during the years at issue was a qualified subchapter S corporation for federal income tax purposes. (Stip. ¶14) BPHA owned and operated the National Hockey League ("NHL") franchise known as the Boston Bruins (hereafter "Bruins" or "the Club"). (Stip. ¶16)

Petitioner Margaret Jacobs held her 1% interest in Deeridge through her sole ownership of Manor House Hockey Assn. LLC. (Stip. ¶9) Petitioner Jeremy Jacobs owned 99% of Deeridge directly and is the former CEO, now Chairman of the Board, of Delaware North Companies, Inc. ("Delaware North"). (Stip. ¶9, 243, and 244)(References hereafter to petitioner are to Mr. Jeremy Jacobs.) Petitioner has been the principal owner of the Bruins since 1976, representing the team on the NHL Board of Governors, and since June 2007, has been the Chairman of the NHL's Board. (Stip. ¶240, 241, 242)

Delaware North is a global leader in hospitality and food services headquartered in Buffalo, NY with operating companies in the lodging, sporting, airport, gaming, and entertainment industries. (Stip. ¶245) Delaware North is one of the largest privately held companies in the world with annual revenue of over $2 billion which provides retail expertise and concessions, gourmet catering and fine dining services to sporting, entertainment, and convention center venues in the United States and Canada. (Stip. ¶246 and 247) Through a subsidiary, Delaware North owns the TD Garden in Boston, MA where the Bruins and Celtics play home games. (Stip. ¶248 and 249)

NHL, BPHA, and Seasons of Play

BPHA's business was conducted in accordance with the NHL Constitution, NHL By-laws, and NHL Resolutions, as well as a Collective Bargaining Agreement ("CBA") executed between the NHL, the NHL member clubs, and the NHL Players' Association, dated July 22, 2005. (Stip. ¶19-21) The NHL season of play typically begins in September and concludes in June of the following year composed of a pre-season, regular season, and post-season. (Stip. ¶28 and 29) Pre-season games are played in September and early October. (Stip. ¶30) Regular season games are played in October through mid-April, and post-season games are played from mid-April through June. (Stip. ¶31 and 30) The seasons

applicable to this matter were the 2008-2009 season, 2009-2010 season, and 2010-2011 season. (Stip. ¶32)

Under the NHL Constitution and By-laws, NHL teams were required to play 82 regular season hockey games against other teams, 41 at a team's home rink and 41 at away city destinations. (Stip. ¶40 and 41) Pursuant to the NHL Constitution, NHL teams do not share gate receipts; regular season ticket revenues, whether game-day or seasonal, are revenues solely of the host team. (Stip. ¶50, 52, and 53)

The Bruins played eight (8) pre-season games in September, 2009, of which six (6) were away (against the Montreal Canadiens on Sept. 20, 2009, at Quebec City, the Bruins were designated the home team.) (Stip. ¶39 and 73, Exhibit 12-J, BRU0000517) The Bruins played seven (7) pre-season games in September - October, 2010, of which five (5) were away. (Stip. ¶73, Exhibit 12-J, BRU0000521) Most pre-season away games of the Bruins during the applicable years did not involve overnight hotel stays. (Stip. ¶36 and 125, BRU0000274) The Bruins played eleven (11) post-season playoff games in 2009, of which five (5) were away games and thirteen (13) post-season games in 2010, of which six (6) were away games. (Stip. ¶73, Exhibit 12-J, BRU0000512, 0516)

In 2009, the Bruins played nineteen (19) regular season away games in the 2008-2009 season and eighteen (18) regular season

away games in the 2009-2010 season. (Stip. ¶73, Exhibit 12-J, BRU0000514-0515, 0518) In 2010, the Bruins played 23 regular season away games in the 2009-2010 season and nineteen (19) regular season away games in the 2010-2011 season. (Stip. ¶73, Exhibit 12-J, BRU0000518-0519, 0522) At the very start of the 2010-2011 season, the Bruins twice played the Arizona Coyotes in Prague, Czech Republic, once as the designated Visitor and once as the Home team. (Stip. ¶36 and 73, Exhibit 12-J, BRU0000522) The total regular season away games during the years at issue numbered 79 = 19+18+23+19.

Hotel Agreements

After the NHL game schedule was finalized for the upcoming season, BPHA would negotiate with hotels at away city destinations for the reservation of hotel rooms by letter agreements. (Stip. ¶82 and 85) Those letter agreements also included provisions to have meals available (breakfast, lunch, afternoon snack, brunch) at certain times in reserved private rooms for the team only. (Stip. ¶92 and 93) A per head amount and estimate of meal attendees was often reflected on the agreements for the meals. (Stip. ¶85, BRU000741, 0931) Meals were to be served buffet style. (Stip. ¶198)

Banquet Event Orders

After execution of the hotel agreements, but prior to the travel date to the away city destinations, BPHA and the hotels would agree on the meal offerings, pricing per head, times for the meals, number of attendees, and any special requirements, like the presence of a paper flip-chart with marker pens or the presence of 2 omelet chefs. (Stip. ¶104 and 110) These agreements were known as Banquet Event Orders ("BEO"). Like the hotel agreements, the BEO were most often executed by Ryan Nadeau, Manager of Hockey Administration for the Bruins. (Stip. ¶108 and 109)

The meal fare for the breakfasts, lunches, snacks, and brunches were largely consistent throughout the varying hotels and tax years. (Stip. ¶103 and 201) Breakfasts largely consisted of cereals, oatmeal, omelets, scrambled eggs, and bacon. (Stip. ¶110, BRU0001227, 1239, and 1294) Lunches consistently included servings of pasta, salad, salmon, steak, and chicken with ice-cream and cookies. (Stip. ¶200, and 110, BRU0001036, 1093, 1181)

Rooming Lists

Another document the BPHA would send to the hotels after execution of the hotel agreements, but prior to the travel date would be a "Rooming List" whereon the Bruins would indicate the

names of Bruins players, coaches, staff, other guests, and outside media persons, and type of room to be assigned such persons. (Stip. ¶138) For example certain players were to be assigned to single rooms whereas other players were to be assigned with another player in double rooms. (Stip. ¶138, BRU0001377-1410, 1412-1460)

With the exception for the multiple-night stay at the hotel in Prague, CZ, 77 Rooming Lists for regular season play have been stipulated. No Rooming Lists for pre-season or post-season playoff games are exhibited.

To keep the players advised as to scheduled activities, players were provided monthly team schedules showing on a monthly calendar practice dates, travel dates, destinations, and game dates and times, both home and away. (Stip. ¶122 and 125, BRU0000235-0238, BRU0000274-0281) Players would also be provided monthly, daily, and trip itineraries which would reflect meal times, game times, practice times, and bus departure times. (Stip. ¶123 and 124, BRU0000241-0273, 0287-0300, 0310-0316, 0321-0322, 0417-0504)

After the away city game had been played, the hotels would invoice BPHA for the rooms, meals, and other amenities. (Stip. ¶111) It was a regular occurrence that the charges for the meals, though separately listed, would be billed to BPHA together

with the charges for the hotel rooms. (Stip. 112 and 117, BRU0002316-2318, 2306-2311, 2323-2326, 2336-2340, 2507) Mr. Nadeau would review the bills and invoices, prepare Hockey Operations Memoranda known as "Expense Memoranda" from the invoices whereon the charges for the hotel rooms would be aggregated and listed with the applicable BPHA or Deeridge financial account, as well as doing so regarding the Team Meal account (Account # 534278) for the meal charges. (Stip. ¶115, 118, and 121) After the Expense Memoranda were approved by Peter Chiarelli, then the General Manager, Mr. Nadeau would have the Expense Memoranda routed to the Bruins' Finance Department for payment to the hotels and bookkeeping. (Stip. ¶119 - 121, BRU0001461-1542)

With some adjustments, Deeridge deducted 100% of the amounts comprising the Team Meal account #534278 for 2009 and 2010. In his Statutory Notice of Deficiency, the Commissioner adjusted BPHA's deduction to 50% of the amounts in the Team Meal account #534278. (Stip. ¶4, Exhibit 1-J)

Travel and Traveling Group

The NHL requires that an NHL club arrive at the away city at least six hours prior to the start of the game. (Stip. ¶59) The CBA requires that an NHL club travel to an away city the day before a game is to be played if the flight to the away city is

greater than 150 minutes. (Stip. ¶60) Given that most pre-season away games by the Bruins were played on the same day as the travel to the destination cities, these travel rules apparently did not apply to pre-season games. (Stip. ¶39 and 125, BRU0000274)

The Bruins would travel to the destination city by air on the day prior to a game on a charter flight. (Stip. ¶130 and 131) If departing from Logan International Airport, a bus would be provided to the traveling complement to get them to the airport. (Stip. ¶132) If departing from a different Boston area airport like Hanscom Field Airport, each travelling employee had to arrange his or her own transportation to the airport. (Stip. ¶133)

The traveling complement of the Bruins, as shown in the 77 Rooming Lists, would generally consist of 20-24 players, most often 23 players (36 instances; nineteen instances of 22 players, the next most frequent). Along with the players, coaches and staff would travel to the away city destinations ranging from nine (9) to 23 persons, most often a complement of thirteen (13) (24 instances; with thirteen (13) instances of a complement of 14 coaches and staff, or twelve (12) instances of a complement of 12). (Stip. ¶306, 78, and 138, BRU0001377-1410, 1412-1460) The regular make-up of the additional personnel accompanying the

players included coaches, medical personnel, trainers, equipment managers, communications personnel, and travel logistics managers. (Stip. ¶78)

The most frequent cadre size of Bruins (players, coaches, plus staff) who traveled to away city hotels numbered 36 (22 instances; 35 was the next most frequent traveling group at eighteen (18) instances). (Stip. ¶306 and 138)

Arrival at Hotel

Upon arrival at a destination city, if time permitted, after check-in players could receive physical therapy, massages, and other medical treatments. In their rooms or in available fitness rooms at the hotel, players could exercise and strength condition. Coaches could meet to discuss upcoming game strategy, review video, and discuss player issues. Coaches could also meet with players to discuss strategy, discuss player issues, and review game video with players, though video review with players on a travel day was infrequent. (Stip. ¶139 and 140) On the arrival day, the players could also get together informally to go out to dinner or to tour, subject to a curfew of 11:00 p.m. (Stip. ¶142-144)

Breakfast and Afterwards

Most games were scheduled for 7:00 p.m. or later local time. (Stip. ¶73, Exhibit 12-J, BRU0000512-0523) When games were so

scheduled to be played in the evening, the Club would generally provide breakfast, lunch oftentimes referred to as "pre-game meal," and an afternoon snack. (Stip. ¶147, 173, 181) (Since the descriptive "pre-game meal" at times in the exhibits refers to all such meals and at other times just to lunch, respondent hereafter employs "pre-game meal" in its generic sense.) Breakfast times were regularly listed on the various itineraries as running from 8:00 a.m. to 10:00 a.m. (Stip. ¶149 and 124) Players could arrive individually for breakfast during the applicable time range. (Stip. ¶150)

The regular eating room set up consisted of round tables with seating for eight (8) and buffet server trays for self-service. Often the hotel contracts and BOE would also provide for one or two omelet chefs to be available. (Stip. ¶198 and 85, BRU0000028; Stip. ¶110, BRU0000351 and 0725)

At breakfast, public relations staff of the Bruins are present in the meal room at their own table with laptop computers. (Stip. ¶154) Such public relations staff may meet with players one-on-one to discuss anticipated media inquiries and interviews. (Stip. ¶155) Players may also meet with other staff to procure tickets for family and guests to attend the away game. (Stip. ¶156) Though not normally done, coaches may meet with players during breakfast one-on-one or in small groups,

including to review video on laptop computers. (Stip. ¶157 and 158)

After eating, at the end of the time period for breakfast, team meetings may be held by the players. (Stip. ¶159) One regularly held meeting is called a Power Play meeting where discussion is held about penalties incurred by the opposing team. (Stip. ¶160) Another regularly held meeting is called a Penalty Kill meeting where discussion is held about penalties incurred by the Bruins. (Stip. ¶161)

Following breakfast, a chartered bus immediately takes the players to the opposing NHL club's game arena or practice facility for morning practice. (Stip. ¶163 and 164) Players usually do not skate for the entire practice time available, usually 45 minutes to 1 hour, per the itineraries. (Stip. ¶124 and 166) Absent coach direction otherwise, it is mandatory for players to be at the morning practice skate. (Stip. ¶171) Coaches are on the ice with the players providing constant direction to the players. In comparison with the direction given by coaches at practice at the Bruins' home practice facility, the direction from the coaches on game day is more focused on game strategy rather than drill technique. (Stip. ¶ 167 and 168) After practice, the chartered bus returns the team to the hotel. (Stip. ¶176)

Lunch and Afterwards

Occurring in the same room as breakfast and in the same setup, the players eat lunch generally between the scheduled time period of 12:15-2:15 p.m. local time. (Stip. ¶174 and 175) In contrast with breakfast, since the team had just been transported together on the bus, the players are more likely to all eat together for lunch. (Stip. ¶149 and 176) At lunch coaches may conduct small group meetings and individual one-on-one meetings with players. (Stip. ¶177) Public relations staff may meet with players to discuss anticipated media inquiries and interviews. (Stip. ¶178) After lunch, the itineraries provide the players with an amount of free time during which players may rest, including nap. (Stip. ¶179 and 180)

Snack and Afterwards

A pre-game snack is available on game day when games are scheduled in the evening. (Stip. ¶181) The snack is available in the same room as the breakfast and lunch. (Stip. ¶182) The snack often consists of bagels, toast and jam, muffins, fresh fruit, coffee and tea, and prepackaged fig bars or similar Nutri-Grain breakfast bars. (Stip. ¶110, BRU0001041, 1053, and 1220) It is not mandatory for players to attend the pre-game snack. (Stip. ¶184) The snack usually is available between 3:15-5:15 p.m. or 3:30-5:30 p.m., local time. (Stip. ¶183)

Following the pre-game snack, and 2.25 hours prior to the game, the players depart for the away city ice arena using a chartered bus. (Stip. ¶185)

Brunch and Afterwards

Occasionally the Bruins play an away game in the afternoon. (Stip. ¶186) When this happens, the breakfast and lunch are replaced by a brunch which generally runs from 8:00 a.m. to 12:30 p.m., depending on the time of the game. (Stip. ¶187 and 188) At the brunch, public relations staff may meet with players one-on-one to discuss anticipated media inquiries and interviews. (Stip. ¶189) Coaches may speak to players one-on-one or in small groups, including reviewing game video on laptop computers. (Stip. ¶190) Meetings with coaches may also occur after brunch at the away city arena right before the scheduled hockey game. (Stip. ¶191) Following brunch and 2.25 hours prior to the scheduled game time, the players depart to the away city arena on a chartered bus. (Stip. ¶192)

Upon arrival at the game arena, players stretch and dress in their uniforms. (Stip. ¶193) While game play is 60 minutes of playing time, the games usually last 150 minutes from start to finish. (Stip. ¶194) The Club generally stays at the arena for about an hour after the game during which players shower, change clothes, and meet with media. (Stip. ¶195) When the Club leaves

the away city arena, it boards a chartered bus to travel to the away city airport for travel to the next away city or back to Boston. (Stip. ¶196)

CBA Rules

The CBA, at Exhibit 14, Form of Standard Club Rules, provides, "Players must be on time for all Club practices, games, meetings and other mandatory Club events." No mention of meals is contained on such Exhibit 14. (Stip. ¶21, Exhibit 11-J, BRU0001951) No Bruins' player was fined in 2009 or 2010 for failing to attend breakfast or other pre-game meal at away city destinations. (Stip. ¶300) Under the CBA, players are entitled to a per diem meal allowance when traveling from the club's home city for the purpose of playing NHL games. The CBA, at Article 19, Per Diem Allowance, provides, in part, "On NHL Game dates away from the Club's home city when game meals are supplied by the Club, the per diem meal allowance shall be reduced by one-half of the amount that would otherwise have been payable." (Stip. ¶21, Exhibit 11-J, BRU0001770)

The Bruins at Home

The Bruins' regular practice and training facility is the Ristuccia Memorial Arena Ice Skating Rink ("Ristuccia") located in Wilmington, MA. (Stip. ¶76) On non-game days when the Club was not travelling during the hockey season, practices were held

daily at Ristuccia. (Stip. ¶204, 125, and 124, BRU0000241, 0252, 0417, 0481) Even on travel days to away cities, practices were held at Ristuccia prior to the players' travel to the departure airports. (Stip. ¶125, BRU0000236, 0278; Stip. ¶124, BRU0000435, 0481, and 0492) During away game travels, when the Bruins were not scheduled to play a game, practices were regularly scheduled on the calendars and itineraries. (Stip. ¶125, BRU0000236, 0237, 0275; Stip. ¶124, BRU0000244, 0247, 0267) In contrast to game day practice, the direction players received from the coaches during practices at Ristuccia more frequently involved drills. (Stip. ¶215)

When a home game is scheduled, it is the player's individual responsibility to get to the TD Garden on time. (Stip. ¶207 and 234) If the game is scheduled for the evening, players usually get to the TD Garden by 9:30 a.m., one hour prior to the normal morning practice skate scheduled to commence at 10:30 a.m. (Stip. ¶208) Power Play and Penalty Kill meetings usually occur at the TD Garden around 9:45 a.m. or 9:50 a.m. (Stip. ¶228)

Similar to the away game practice skates, the direction from the coaches more focused on strategy skating than drills. (Stip. ¶215 and 168) Also similar to the away game practice skates, players did not usually skate for the full time allocated 45 minutes to 1 hour. (Stip. ¶211 and 212; Stip. ¶124, BRU0000241,

0259, and 0292) Rather players skated for 10-15 minutes, with the intent to get players' legs warmed-up. (Stip. ¶211 and 212) While it is mandatory that players be present at the practice skate at the TD Garden, coaches may allow the players the option whether to skate. (Stip. ¶213)

Prior to arriving at the home game practice skate, players are responsible for securing their own breakfasts. Breakfast fare is left to a player's discretion. (Stip. ¶216 and 218)

After the morning practice at the TD Garden, players may go and stretch or undergo physical therapy with staff. (Stip. ¶219) Players may also get a massage from staff. (Stip. ¶220) Commencing around 11:00 a.m. on an evening scheduled home game, the Club provides the players with a lunch in a sixth floor VIP room. (Stip. ¶221 and 224) The lunch food is consistent with that available at the hotels during away games, namely, servings of steak, chicken, salmon, pasta, rice, potato, salad, fruit, ice-cream, and cookies. (Stip. ¶223) Players may arrive at the lunch at noon rather than 11:00 a.m. depending on their morning regimes. (Stip. ¶225)

Coaches may attend the lunch, and in small groups or in one-on-one meetings coaches may show players video clips. (Stip. ¶226 and 229) Review of video is generally not shown during the lunch. (Stip. ¶227) Video review is usually undertaken in an

assistant coach's office. (Stip. ¶230) If a larger group needs to meet, applicable team players and coaches sit together in a larger conference room than an assistant coach's office. (Stip. ¶231) In a larger conference room at the TD Garden, a wall-mounted flat screen monitor can be used to display video clips. (Stip. ¶232)

After the lunch, players may return to their residences for afternoon rest or naps. (Stip. ¶233) Players must return to the TD Garden by 5:00 p.m. for a 7:00 p.m. scheduled home game. (Stip. ¶234)

BPHA Revenues

In addition to gate receipts from home games, BPHA earned revenues from the ownership and operation of a sports shop located in the TD Garden during 2009 and 2010. (Stip. ¶253) According to its audited financial statements for the years ending June 30, 2009, 2010, and 2011, BPHA earned revenues from four (4) categories, Ticket sales, Broadcast revenues, Merchandise sales, and Other. (Stip. ¶252, BRU0000527 and 0543) The respective amounts (in thousands) were as follow:

	June 30, 2009	June 30, 2010	June 30, 2011
Ticket sales	48,690	55,008	80,439
Broadcast revenues	23,442	24,606	25,500
Merchandise sales	4,910	4,868	6,773

Other	6,759	8,915	10,652
	$83,801	$93,397	$123,364

BPHA earned broadcast revenue, in part, from its partnership interest in the New England Sports Network, Limited Partnership ("NESN") which broadcast Bruins' games in the New England area. (Stip. ¶256) BPHA owned a 19.98% partnership interest directly in NESN and 0.05% through intermediary or affiliated entities. (Stip. ¶257)

Other than for Massachusetts and New York, BPHA or Deeridge did not report income or excise taxes to another state for 2009 and 2010 arising from games played by the Bruins in away cities. (Stip. ¶301 and 307, BRU0002904; Stip. 12 Exhibits 5-J and 6-J)

BPHA Officers and Activities

BPHA maintained offices for officers and staff at 100 Legends Way, Boston, MA 02114, where it also kept its books and records. (Stip. ¶261, 262, 298, and 299) The Club directories for the 2008-2009, 2009-2010, and 2010-2011 seasons list office members associated with the Bruins but not players. (Stip. ¶263, BRU0000557-0559) The respective departments listed on the 2008-2009 club directory include Executive; Hockey Operations; Coaching; Medical & Training; Communications & Community Relations; Sales, Marketing & Retail; and Finance, Legal, Human Resources & Box Office. For the two following seasons, the

Executive department was split into two departments Ownership and Executive, while Medical & Training became Medical, Training & Equipment. Of the 99 persons listed on the 2008-2009 Club directory, four (4) individuals were employed not by BPHA but by Delaware North, namely petitioner Jeremy Jacobs, Charlie Jacobs, Jeremy Jacobs, Jr., and Louis Jacobs. (Stip. ¶264)

Three individuals, Physical Therapist Scott Waugh, Head Team Physician Dr. Peter Asnis, and Team Psychologist Dr. Frank Lodato were not employed by BPHA. (Stip. ¶264) The remaining members were either BPHA employees (82) or employees of TD Garden (10). (Stip. ¶264) The activities of these employees included doing media relations, payroll, accounts payable, and financial statements. (Stip. ¶267) The employees worked throughout the year, and other than those who may have traveled with the players to an away game destination city, the work of the employees continued to be performed regardless of the travels of the team. (Stip. ¶266, 269, and 283) Included in the activities performed by the office personnel at 100 Legends Way were making travel arrangements for players and coaches, equipment purchases, negotiating player contracts, negotiating television and radio broadcast contracts, negotiating contracts for insurance, registering trademarks for BPHA, and approving final designs for Bruins' logos and trademarks. (Stip. ¶270-280)

Prior Commonwealth Tax Abatement Litigation

In 1998, the petitioners and BPHA petitioned the Appellate Tax Board ("ATB") of the Commonwealth of Massachusetts for abatement of income and corporate excise taxes, respectively, regarding their 1991-1994 tax years. (Stip. ¶287, 288, and 290) Petitioners and BPHA argued, *inter alia*, that although the Bruins did not share in gate receipts from the regular season away games that the Bruins played, such away-game-play generated consideration in the form of an obligation on the part of the away team to play in Boston and hence Massachusetts was in error to fully tax the Bruins' ticket revenues. (Stip. ¶292, BRU0002829, 2849-2850) The BTA found as fact that the Bruins' business activity was not the play of individual hockey games, but the ownership and operation of a sports franchise. (Stip. ¶292, BRU0002850) Further, the BTA found that the NHL Constitution obligated the NHL clubs to play both home and away games. The obligation for another NHL club to play in Boston arose not as a consequence of the Bruins' playing at an away club's home arena. (Stip. ¶292, BRU0002849) On this issue, the Supreme Judicial Court of Massachusetts affirmed the decision of the BTA. (Stip. ¶294, BRU0002812-2813) The same provisions in the NHL Constitution exist in the present tax matter.

Discrimination

Invoices for the meals for regular season play from October through December 2009 are exhibited, as well as for the 2010-2011 season. (Stip. ¶117) In most instances, those invoices reflect the number of attendees upon which the hotel based its meal charges. (Stip. ¶117, BRU0002291-2292, 2302-2303, 2498-2501) The number of attendees per the invoices for breakfast, lunch, or brunch was consistently less than the number of players, coaches, and staff who traveled to the destination city hotel as detailed on the Rooming Lists. Three exceptions were uncovered for the games on November 1, 2009, March 30, 2010, and November 17, 2010 against the Rangers, Devils, and Rangers, respectively. (Stip. ¶306, GOV00010979-10980) Regarding the New York games, petitioners did not present hotel meal invoices from which the number of attendees could be ascertained so a secondary document like a hotel agreement or BOE was used. (Stip. ¶85, BRU0000118-0120; Stip. ¶110, BRU0001354) There is general correlation between the number of meal attendees per the invoices (or in the absence of invoice, the hotel agreement or BOE) and the number of players plus coaches, or players plus coaches plus executives like the President, General Manager ("GM") or Assistant GM (collectively "General Managers" or "GMs") who often traveled. (Stip. ¶306, GOV00010978-10981) With minimal exception, the

players, coaches, President, and General Managers derived compensation from BPHA in 2009 and 2010 in excess of $110,000 per year. (Stip. ¶304 and 305, GOV00010974 and 10976) In contrast, of the staff who most frequently traveled (more than 10 trips), nearly all earned compensation below $110,000, (nine out of eleven). (Stip. ¶305, GOV00010976)

The most frequent number of travelers (players + coaches + staff, including executives) per the Rooming Lists was 36. (Stip. ¶306, GOV00010978-10981) The most frequent number of attendees for breakfast/brunch per the invoices (or in the absence of invoice, the hotel agreement or BOE) was 25 (34 instances; 28 attendees at twenty-one (21) instances was the next most frequent). (Stip. ¶306, GOV00010978-10981) The most frequent number of attendees for lunch was 25 (30 instances; 30 attendees at twenty (20) instances was next). (Stip. ¶306, GOV00010978-10981) The most frequent grouping of players, coaches, executives, and GMs numbered 29 (25 instances; groupings of 30 and 28 were the next most frequent at thirteen (13) instances each). (Stip. ¶306, GOV00010978-10981)

BRIEF SYNOPSIS OF LEGAL AUTHORITIES:

Deductions are a matter of legislative grace, and a taxpayer bears the burden of proving he is entitled to the deductions claimed. See Rule 142(a); INDOPCO, Inc. v. Commissioner, 503

U.S. 79, 112 S.Ct. 1039, 117 L.Ed.2d 226 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); Commissioner v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 (1974). The Commissioner accepted 50% of the claimed away-game meals deduction, and in so doing did not dispute the business nature of the claimed meal expenses, including those expenses for the non-mandatory afternoon snack, as an ordinary and necessary business expense. I.R.C. § 162. Remaining for petitioners to establish is whether they are entitled to one or more of the exceptions to the 50% limitation of I.R.C. § 274(n)(1).

Issue 1

The Internal Revenue Code § 274(n)(1)(A) provides that the amount allowable as a deduction for any expense for food or beverages shall not exceed 50 percent of the amount of such expense which would otherwise be allowable as a deduction. I.R.C. § 274(n)(2)(B) excepts from the 50% limitation expenses for food or beverages, where such expenses are excludable from the gross income of the recipient by reason of I.R.C. § 132(e), relating to de minimis fringes.

I.R.C. § 132(e)(2) defines as a de minimis fringe the operation by an employer of any eating facility for employees if (A) such facility is located on or near the business premises of

the employer and (B) the revenue derived from such facility normally equals or exceeds the direct operating costs of such facility.

The applicable regulations provide:

An employer-operated eating facility for employees is a facility that meets all of the following conditions -

(i) The facility is owned or leased by the employer,

(ii) The facility is operated by the employer,

(iii) The facility is located on or near the business premises of the employer, and

(iv) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.

Treas. Reg. § 1.132-7(a)(2). Petitioners' burden, *inter alia*, is to substantiate that each of the hotel meeting rooms constitute an eating facility for purposes of I.R.C. § 132(e)(2) and that such eating facility is "employer-operated" as defined under Treas. Reg. § 1.132-7(a)(2).

Issue 1.a

To date, no case law addresses the question of what constitutes an "eating facility" contemplated under the statute. A Chief Counsel Advisory on the matter was issued with respect to

the exclusion from gross income of the value of catered meals that airline crew members receive while they perform flight duties. In that matter the meals were prepared by a third-party vendor not owned, leased, or operated by the crew's employer. The meals, though excludable under I.R.C. § 119 as they were served to the crew at the convenience of the employer, nevertheless failed to meet all the requirements of § 132(e)(2) as they were prepared at the third party vendor's facilities.

> This exclusion [under § 132(e)(2)] extends only to such meals provided at employer-operated *eating facilities*. Although the Code, Regulations, and cases never explicitly define the term "eating facility," they do imply that an "eating facility" means an identifiable location that is designated for the preparation and/or consumption of meals.

IRS CCA 201151020, 2011 WL 6464323 (2011). Looking to provisions in the Treasury Regulations at § 1.132-7(b) which describe the requirements of I.R.C. § 132(e)(2), the advisory notes that the regulations refer to "dining rooms" and "cafeterias." [see Treas. Reg. § 1.132-7(a)(1)(ii) ("each dining room … in which meals are served is treated as a separate eating facility"); Treas. Reg. § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each dining room"); Treas. Reg. § 1.132-

7(a)(1)(ii) ("each … cafeteria in which meals are served is treated as a separate facility"); Treas. Reg. § 1.132-7(b)(ii) ("direct operating costs test may be applied separately for each … cafeteria")]

Additionally, as referenced in the advisory and as commonly found at such facilities as dining rooms and cafeterias, the regulations contemplate a location at which individuals are employed to prepare and/or serve food. "[C]omponents of the direct operating costs of an eating facility include 'personnel' whose services relating to the facility are performed on the premises of the eating facility" (Treas. Reg. § 1.132-7(b)(ii)) and "labor costs attributable to cooks, waiters, and waitresses." (Treas. Reg. § 1.132-7(b)(ii)).

Respondent contends that BPHA's use of hotel meeting rooms involving buffet style meals and round tables organized for 25-30 attendees is not what Congress intended to constitute an eating facility under I.R.C. § 132(e)(2). The meals do not involve waiters, waitress, or cooks, other than the occasional omelet chef. The meeting rooms are temporarily organized to accommodate the BPHA's buffet style meal. Food is prepared by hotel staff in the hotel kitchen. Other than the omelet chefs, no personnel costs are directly charged to BPHA. The food stations and seating are not fixtures permanently constructed next to a

kitchen as in the case of a cafeteria or formal dining room. Instead, the room setup exemplifies the transient nature of activity. This setup is consistent with the actual documentation which reflects not the acquisition or operation of a food preparation facility, but only the purchase of a few meals on an individual day to be held in a private room.

Issues 1.b and 1.c

Even if the hotel meeting room should be considered an "eating facility" for purposes of I.R.C. § 132(e)(2), that eating facility is not "employer-operated" because BPHA does not satisfy all four requirements under Treas. Reg. § 1.132-7(a)(2). Specifically, the facility is not (1) owned or leased by the employer, (2) operated by the employer, or (3) located on or near the business premises of the employer. Respondent does not assert that BPHA has not substantiated the fourth requirement that the meals are provided during, or immediately before or after, the employee's workday. Failing the other requirements, however, BPHA's use of the hotel meeting rooms is not an "employer-operated eating facility."

Under the statute, an employer itself does not need to directly operate the eating facility. If the employer contracts with another to operate the eating facility for its employees, the facility is considered to be operated by the employer.

Treas. Reg. § 1.132-7(a)(3). Petitioners have not substantiated that BPHA contracted with the hotels for the operation of an eating facility.

The hotel agreements and BOE do not substantiate compliance with the regulatory requirements for either a lease of eating facilities or for contracting for the operation of such eating facilities. Unquestionably petitioners do not own the hotels or kitchens at the away city destinations. Rather, petitioners assert that BPHA leases such eating facilities and that the letter agreements and BOE further constitute contracts for service by the hotels for the operation of such eating facilities.

None of the various letter agreements or BOE provided by petitioners are in the form of lease agreements or service contracts. Rather they are under the various letterheads of the respective hotels (e.g., Embassy Suites, Sofitel, Hilton). The hotel letter agreements are predominantly in the form of a reservation for blocks of rooms with provisions for amenities, billings, security, arrival, baggage handling and such.

With respect to the provision of meals, the multiple page agreements contain minimal text relevant to the meals. They generally contain an agreed time frame for the provision of the meals, number of expected attendees, sometimes a per head

pricing, description that the meals are to be provided buffet style in a private meeting room, and that at a subsequent date the Bruins would provide menus or that the menu price was based upon an earlier interchange between the contracting parties. A number of the hotel agreements do provide that for breakfast or brunch, the hotels would have a chef available to cook omelets to a player's personal specifications. It is a regular provision in the hotel agreements that the hotels reserved the right to change the room wherein the Bruins were to eat if the number of expected attendees changed. (Stip. ¶85, BRU0000040, BRU0000052, BRU0000062, BRU0000138, BRU0000152, BRU0000187)

In comparison with the hotel agreements, the BOE are more focused on the meals and on their face present meal order agreements, not contracts for the lease of eating facilities or contracts for the operation of such facilities. The BOE present the scope of food offerings, quantities, expected number of attendees, dates and times of meals, and more specificity, for example mashed sweet potatoes rather than regular mashed potatoes (Stip. ¶110, BRU0001192), chocolate syrup and strawberries or strawberry syrup for ice cream (Stip. ¶110, BRU0001344, BRU0001098, BRU0001274), and audio visual requirements like the presence of a flip-chart with markers. (Stip. ¶110, BRU0001194, BRU0001118)

Petitioners do not employ any of the hotel kitchen staff, nor do the letter agreements or BOE provide that the hotels' kitchens are exclusively under lease to the Bruins during their away game stays. In fact, no mention is made of kitchen or cafeteria. Nor is there any provision for insurance against tort liability for kitchen-related injuries. On the contrary, some agreements expressly provide that the Bruins are liable for property damages to the reserved "function space" caused by the Bruins. Most of the agreements reflect that the host hotels are providing the Bruins with the private rooms on a complementary basis. As for the buffet appurtenances like the food trays and holding stands for the food trays, BPHA holds no possessory interest therein. Unlike a lease agreement which connotes a longer term of use, the time periods contemplated in the letter agreements and BOE involve only blocks of time during a single day, game day, at best more akin to a short-term room rental agreement.

A case cited by petitioners on this matter is unavailing to their position. In the case of Mabley v. Commissioner, T.C. Memo. 1965-323, a corporation entered into a long term lease for a suite at a nearby hotel, including a dining room, reception room, closet, and toilet. The corporation furnished the suite with its own furniture. Daily meetings for the executives were

held at the leased suite at which attendance was mandatory, and at which staff were expected and did present weekly reports. The lease did provide that the hotel would, when requested, provide meals from the hotel kitchen at current rates charged to hotel guests. The petitioning vice-president successfully argued that the value of the meals should be excluded from his income as the meals were furnished for the convenience of his employer and on his employer's business premises under I.R.C. § 119. As emphasized by the Tax Court, the daily briefings occurring in Mabley constituted significant corporate activity as it enabled the executives to economize in one meeting what otherwise would have taken multiple meetings throughout the workweek. But unlike the facts in Mabley, BPHA's hotel agreements and BOEs are not long-term leases for facilities. They are room reservation agreements with provision for a single day reserved private room with selected meal fare offered during certain hours of a game day.

Finally, the reasoning of petitioners leads to an impermissible result. On this point, petitioners essentially argue that solely by virtue of a contract for a meal for a sufficient number of a business's employees to be held at a proximate eating facility, for example a nearby restaurant, an employer has leased the eating facility. In so arguing,

petitioners would be contending that the requirements of the statute and regulations for the operation of an eating facility would have been satisfied. Given that presumably business activities transpired immediately before or after attending the meal, or that business was discussed at the meal, petitioners would then consequently claim satisfaction of the requirements of § 132(e)(2) to find exception to the 50% deduction limitation of § 274(n)(1)(A). Such transformative power of a letter agreement, for say a luncheon to be held a local restaurant, surely was not contemplated by Congress in enacting § 132(e)(2) as it would effectively eviscerate the § 274 limitations.

Issue 1.d

Respondent understands petitioners' position to be that the away city hotel constitutes the BPHA's business premises during the travel to the away city and hence the requirements of the statute and regulation are satisfied which state, "such [eating] facility is located on or near the business premises of the employer." I.R.C. § 132(e)(2)(A); Treas. Reg. § 1.132-7(a)(2)(iii).

Whether or not a location is on the business premises of an employer is a factual test to be determined on a case by case basis, requiring a common sense approach. Adams v. United States, 585 F.2d 1060 (Ct. Cl. 1978). The phrase has been

construed to include premises on which the employer carries on some substantial segment of its business activities and a place where the employee performs some "significant portion of his duties." McDonald v. Commissioner, 66 T.C. 223, 230 (1976).

Adams involved an employee seeking to exclude the Tokyo rental value of his employer provided apartment from his gross income under § 119(a)(2), which permits exclusion in the case of lodging when the employee is required to accept such lodging on the business premises of his employer as a condition of employment. The court began its analysis, by citing the case of Lindeman v. Commissioner, 60 T.C. 609, 617 (1973) (per curiam) acq., 1973-2 C.B. 2, where the Tax Court noticed that "[t]he operative framework of [the clause 'on the business premises'] is at best elusive and admittedly incapable of generating any hard and fast line." Directing that the statute should not be read literally, the Adams court quoted Lindeman at 614,

> [T]he statutory language ordinarily would not permit any exclusion for lodging furnished a domestic servant, since a servant's lodging is rarely furnished on "the business premises of his employer"; yet the committee report * * * shows a clear intention to allow the

exclusion where the servant's lodging is furnished in the employer's home.

Adams at 1066.

In Lindeman, a Ft. Lauderdale hotel had its on-call general manager reside in a house across the street from the hotel where he could observe the hotel, had a direct telephone line to the hotel should his presence be immediately requested, and from which he conducted some business planning activities. The Court determined that the house was so situated and so used that it was a part of the hotel plant. In analyzing the question, the court wrote, "The issue as to the extent or the boundaries of the business premises in each case is a factual issue, and in resolving that question consideration must be given to the employee's duties as well as the nature of the employer's business." Lindeman at 616.

The applicable regulation generally referred to the business premises of the employer as the place of employment of the employee. Treas. Reg. § 1.119-1(c)(1). According to the Adams court, the phrase was not to be limited to the business compound or headquarters of the employer. Rather the emphasis was to be upon the place where the employee's duties were to be performed. See, Commissioner v. Anderson, 371 F.2d 59, 68 (6th Cir. 1966) cert. denied 387 U.S. 906, 87 S.Ct. 1687, 18 L.Ed2d 623 (1967).

In Anderson, the Circuit Court held that although a motel owner had built a house two short blocks from the motel to be used by a manager and his family as their home, and the manager was required to be available upon a 24-hour-a-day basis and for that reason was required to live in such house, and the employer paid all utilities as well as laundry, dry cleaning and cleaning expenses and also furnished the manager's family with milk and certain staple groceries, the meals were not furnished and the lodging was not provided on the business premises of the employer within the statute. The test employed by the Sixth Circuit reads:

> [A]s used in § 119, [the phrase 'on the business premises'] means that in order for the value of meals or lodging to be excluded from gross income, the meals must be furnished or the lodging be provided either at a place where the employee performs a significant portion of his duties or on the premises where the employer conducts a significant portion of his business.

Anderson at 68.

Like Adams, the taxpayer in McDonald was also an employee receiving a rental allowance for a residence and later an apartment in Tokyo. Unlike the Court of Claims, however, the Tax

Court determined that the taxpayer therein failed all three requirements under § 119 that the lodgings be furnished for the convenience of the employer, that the lodgings be on the business premises of the employer, and that the employee was required to accept the lodgings as a condition of employment. With respect to the second requirement pertinent hereto, the Tax Court determined that the "quantum and quality" of the business activities performed in the housing was insufficient to render the housing a "business premises" under the statute. The taxpayer merely occasionally entertained business guests and periodically received and made business calls there. The McDonald court noted that both petitioner and respondent had recognized that business premises were not defined solely in terms of an employee's place of employment, but may include housing where the employee performs a significant portion of his duties or where the employer conducts a significant portion of its business.

Respondent submits that the activities occurring at the hotels when viewed in comparison with BPHA's entire business operations, as well as in comparison with the actual performance of the professional hockey game, demonstrate that such activities, though arguably business related, fall short of the "quantum and quality" or degree of significance tests articulated

in McDonald and Anderson. See also, Benninghoff v. Commissioner, 71 T.C. 216, 222 (1978) (per curiam) (degree of significance of the activities performed by the employee at the Canal Zone considered in determining whether I.R.C. § 119 permitted exclusion.)

The Bruins traveled to the destination cities not to attend meetings at the hotels, undergo physical therapy at the hotels, discuss strategy at the hotels, or review video of the opposing teams at the destination hotels. They traveled to play the game. The play of the game is without question the most significant activity performed by the employees, an activity conducted at the host team's arena, not at the hotel. Though a few hotel stays involved 2 nights, overwhelmingly, the hotel agreements reflect only a 1 night stay. In most all cases, over a regular season's play, the Bruins did not stay at the same hotel for more than two nonconsecutive nights. Some destination cities were only visited by the Bruins once over the regular season play in the two years at issue (Detroit, MI; Glendale, AZ; St. Paul, MN; Dallas, TX; Los Angeles, CA). Balanced against those travelling days with little temporal connection to the individual destination city hotels, the Bruins played half of their regular season games in the same TD Garden in Boston or conducted daily practice skates on non-game days at the Bruins' practice rink at Ristuccia. To

accept petitioners' characterization of these hotel facilities would elevate a location such as Detroit, Michigan, at which the Bruins spend one day every two years. A location at which an individual works so sporadically surely cannot be his or her "place of employment," as "business premises" is defined in section 1.119-1(c) of the Treasury Regulations. Petitioners' reading would effectively render this statutory limitation null.

On an actual game day at a destination city, the activities occurring at the hotels were limited in time due to the need to be present for practice and game preparation for the evening's game. For instance, immediately after the scheduled breakfast a bus departure for morning practice occurs. At the practice, coaches meet with players and give strategic direction regarding skating and game-play. Even on those days when the team is in a travel status, but no game is scheduled for play, the Bruins' calendar reflects a regular practice skate whereas those itineraries and calendars fail to list any meetings whether "player only" or otherwise with coaches on the game days. Practice is so significant, that even on the days of departure from Massachusetts, morning mandatory practices at Ristuccia are calendared.

Admittedly upon arrival at a destination city, players may exercise, get a massage from the team's physical therapist, get

medical treatment, and the coaches may meet, review video, and discuss strategy. If time permits upon arrival, players may in the alternative go out in groups for dinner or to tour the town.

While eating breakfast, no significant team meetings occur as the players are not even, initially, all present since players can arrive at their discretion during the stated breakfast period, usually 8:00 - 10:00 a.m., rather than arrive en mass at 8:00 a.m.

The CBA directs that players must attend meetings, but those rules make no mention of whether meals constitute mandatory meetings. Rather, it appears that Power Play and Penalty Kill meetings occur after the breakfast has been consumed, not during. And while respondent has not conceded that attendance at breakfast, brunch, or lunch meals is mandatory, petitioners concede the pre-game snacks, the costs for which have been deducted, are not mandatory meals for the players. Regarding breakfast, when at home on game days, players decide what to eat and when. After lunch on game days in Boston, players are free to return to their homes prior to their return to the TD Garden prior to game time.

Among the activities which are performed home and away, coaches strategize, coaches meet one-on-one or in small groups with players, coaches show video to players, players conduct

player-to-player discussions, players exercise, players receive medical treatments, and players can get a massage. That these ancillary activities to game play occur both at home and away reflects their business nature, but the ubiquity of these activities demonstrates that they are not materially significant in relation to the actual game play.

Other documents are relevant to contextualize the degree of significance to be accorded the activities transpiring at the away-city hotels. The audited financial statements present the BPHA as a business engaged in the ownership and operation of an NHL sports franchise located in Boston. "The [BPHA] generates revenue primarily from ticket sales, television and radio broadcasting, and retail sales from its sports shop" located in Boston. (BRU0000546)

The travelling unit of the Bruins encompasses the 23 players plus coaches, GMs, executives, and support staff. But the 23 players are only a minority of the employees of BPHA. Those other employees of BPHA continue work, year round, not just during the hockey season and continue to perform their business activities regardless of the travel of the team to play an away game. Roughly 92 listed employees at the Bruins' offices at 100 Legends way, Boston, MA continued to function. Petitioners state that 10 of the persons on the 2008-2009 Bruins' club directory

were employees of "TD Garden," without further explanation as to entity form or ownership, rather than BPHA. Since Delaware-North owns the TD Garden building and petitioner Jeremy Jacobs is Chairman of Delaware-North, "TD Garden" the entity, is presumed an affiliate of BPHA.

Activities continued to be performed in Boston including making travel arrangements for players and coaches, equipment purchases, negotiating player contracts, negotiating television and radio broadcast contracts, negotiating contracts for insurance, registering trademarks for BPHA, and approving final designs for Bruins' logos and trademarks. The business activities of the officers and staff of the Bruins in Boston are no less significant to the business operations of BPHA than the aforementioned away-city hotel activities.

Each away city hotel cannot be considered a separate business premises for the Bruins because neither a significant portion of the players' duties occur at each away-city hotel nor does a significant portion of petitioners' business occur at each away-city hotel. When the hotel based activities are evaluated in the context of the other destination city activities like ice-skating practice, or more importantly the actual game play, the significance of the hotel based activities decreases. When further evaluated in light of the player and coach activities

occurring at home during practice or during a home game, those hotel activities lose further significance. Finally, when reviewed in the context of BPHA's entire business operations and employee workforce, the limited away game hotel activities at each individual hotel are shown to lack the "quantum and quality" or degree of significance needed to establish the pertinent hotel BPHA's business premises for I.R.C. § 132(e)(2) purposes.

Issue 1.e

A further requirement of I.R.C. § 132(e)(2)(B) is that the revenue generated by the operation of the eating facility must equal or exceed the direct operating costs of the facility.

The flush language of the statute provides a safe harbor for this determination. For purposes of this section, an employee entitled under section 119 to exclude the value of a meal provided at such eating facility shall be treated as having paid an amount for such meal equal to the direct operating costs of the facility attributable to such meal. Hence, satisfaction of the revenue test of § 132(e)(2) turns upon whether BPHA's employees are able to exclude the value of the meals pursuant to § 119. The two (2) requirements of § 119 relevant to this case are that the meals be furnished for the convenience of the employer and that the meals be furnished on the business premises of the employer. § 119(a)(1). The business premises question

has already been addressed.

Issue 2.a

In order to comply with the revenue test of I.R.C. § 132(e)(2) which references the income excludability requirements of I.R.C. § 119, an employer must provide the meals to its employees for its convenience. Meals furnished without charge to the employee will be considered for the convenience of the employer if such meals were furnished for a substantial non-compensatory business reason of the employer. Treas. Reg. § 1.119-1(a)(2). Regulatory examples include where the employee needed to be restricted to a short meal period and the employee could not be expected to eat elsewhere in such a short time, if the employee needed to be on-call for emergencies during meal periods, and if there were an absence of sufficient eating facilities in the vicinity of the employer's premises. Treas. Reg. § 1.119-1(a)(2)(ii). Given that the hotels are all in regularly travelled destination city locations like Tampa, Pittsburgh, Philadelphia, Montreal, and Atlanta, there exists no lack of existing eating facilities necessitating that the meals be at the hotel.

Petitioners presumably consider the need to control the whereabouts of the players during game-day as providing

sufficient reason for furnishing the pre-game meals. However, during home games, the arrival of the players for morning practice, the players' decision whether and what to eat for breakfast, as well as their expected arrival at the TD Garden in sufficient time for an evening game are all matters left to the discretion and professionalism of the players. (Stip. ¶ 208, 216, 219, 220, 225, 233, and 234)

The courts have generally applied the business necessity theory while examining whether meals are furnished for the convenience of the employer. Commissioner v. Kowalski, 434 U.S. 77, 93 (1977). Under the business necessity theory, the exclusion from gross income for meals applies only when the employee must accept the meals in order to properly perform his duties. Id. In this case, under the CBA players are required to attend meetings. Petitioners have not substantiated that the informal player to player discussions over pre-game meals or one-on-one meetings with coaches satisfy the attendance at meetings requirement contemplated in the CBA.

More importantly, petitioners have provided no evidence that such meetings could not occur after the meals. The itineraries provided to respondent show substantial open time during the game days prior to the departure time for the bus to the game arena. Moreover, meetings during the players' away-game breakfast meals

were infrequent. (Stip. ¶ 158) Rather, meetings occur after breakfast has been concluded and prior to bus departure for practice (Stip. ¶ 159-161, 191). This away-game end-of-breakfast meeting activity accords with the Bruins' regular activities for home games. (Stip. ¶ 228, 208, 211, and 224)

In Moss v. Commissioner, 80 T.C. 1073 (1983) the attorney therein sought to exclude from his personal income his distributive share of the costs of lunches regularly paid for by his firm where the firm's attorneys met daily at noon for case review, assignment, update and discussion at a café across from the courthouse. Petitioner therein asserted that luncheons were considered as a part of the attorneys' workday. The Court held,

> [W]e are convinced that petitioner and his partners and associates discussed business at lunch, that the meeting was a part of their working day, and that this time was the most convenient time at which to meet. We are also convinced that the partnership benefited from the exchange of information and ideas that occurred. But this does not make his lunch deductible any more than riding to work together each morning to discuss partnership affairs would make his share of commuting costs deductible.

Moss at 1081-1082.

The petitioners' provision of meals to the players is similar to the law firm's provision of meals to the lawyers in Moss. The petitioners claim that the meals allow the club to control the players' nutrition in order to enhance their performance. In addition, they assert the meals help the team control the players' movements throughout the day which ensures that the players make it to the arena on game day. As in Moss, the provided meals possibly confer some benefit upon the employees; however, the meals were not necessary for the players to properly perform the attendant activities like attend meetings, discuss strategy, view films, exercise, do physical therapy, or practice skate. Although the team may have conducted some player meetings during meals, only on occasion did coaches and players meet during breakfast. In fact, players had discretion as to when to arrive at breakfast, provided they arrived during the designated time period, usually 8:00 a.m. to 10:00 a.m.

The occasional meetings could have transpired at any other time of the day leading up to the game. Furthermore, the meals themselves were not necessary for the players to complete the listed activities. Other food options were available, including individual room service or patronizing nearby eating establishments. At home games, the ability to eat breakfast at home, and

nevertheless, as professionals, still attend meetings, reflects that during away-games, the players could again have eaten on their own. Since the meals were not necessary for the players to properly perform their duties, the meals are not provided at the convenience of the employer.

Issue 2.b

The relevant matters underlying the issue of business premises have already been articulated at Issue 1.d.

Issue 2.c

I.R.C § 119(b)(4) provides that when meals are furnished on the business premises of an employer and it is determined that more than half of those employees were furnished the meals for the employer's convenience, all meals furnished on such business premises will be treated as for the convenience of the employer.

Per the Rooming Lists, the most frequent numbers of travelling players during the years at issue were 23 or 22. The most frequent number of travelers consisting of players, coaches, staff, including executives, and GMs was 36. If petitioners substantiate that the meals were provided to the players on BPHA's business premises for BPHA's convenience pursuant to I.R.C. 119(b)(4), the remaining pre-game meals provided to the other BHPA employees would be considered provided for the convenience of BPHA.

Issue 3

A further requirement of I.R.C. § 132(e)(2), as stated in its flush language, is that the provision of the meals must not be done in a manner that discriminates in favor of highly compensated employees. The statute reads:

> The preceding sentence shall apply with respect to any highly compensated employee only if access to the facility is available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees.

A highly compensated employee is one who during the 2009 and 2010 years at issue, received compensation from the employer in excess of $110,000. I.R.C. §§132(j)(6) and 414(q)(1)(specifying that the Department of Treasury will regularly adjust the highly compensated employee compensation threshold); Treas. Reg. § 1.132-8(f)(1)(ii) and (iv); I.R.S. Notice 2008-102, 2008-2 C.B. 1106 (announcing 2009 threshold); I.R.S. Notice 2009-94, 2009-2 C.B. 848 (announcing 2010 threshold). The players, coaches, and executives that traveled were highly compensated. The other Bruins' employees that most frequently traveled with the team were not highly compensated.

The determination of whether a benefit is available on substantially the same terms shall be made upon the basis of the facts and circumstances of each situation. In general, however, if any one of the terms or conditions governing the availability of a particular benefit to one or more employees varies from any one of the terms or conditions governing the availability of a benefit made available to one or more other employees, such benefit shall not be considered to be available on substantially the same terms except to the extent otherwise provided in the regulation regarding necessary discrimination due to insufficient availability of the fringe benefit where discrimination is allowed on a priority basis (first come, first served) or seniority. Treas. Reg. § 1.132-8(c)(1), (2)(i) and (2)(ii).

Petitioners have been inconsistent on the question of to whom the pre-game meals were made available. The petition alleges, "the meals are made available to the club's entire hockey operations staff." (Petition ¶ 5.h.vii) The BOE often reflect the number of ordered entrees exceeded the number of players. For example, in addition to other foods like soup, salads and pasta, the BOE for the lunch at the Marriott in Long Island, NY on January 15, 2009 included servings of 10 filet mignon steaks, 25 salmon filets, and 35 boneless, skinless chicken breasts. (Stip. ¶ 110, BRU0001018) However, only 23

players were present on that trip. (Stip. ¶138, BRU0001377) In addition to the 23 players, 6 coaches, 1 executive, and 7 support staff stayed at the Marriott (BRU0001377). The parties have stipulated that coaches and staff may be present in the meal room with the players at meal time. (Stip. ¶ 177, 178, and 156). The issue of exactly who eats, however, has not been substantiated.

The hotel meal invoices upon which BPHA made payment regularly demonstrate that the number of meal attendees was less than the full travelling complement. For the October 16, 2009 game in Dallas, the BOE with the Ritz-Carlton shows 35 portions of chicken, 20 portions of fish, and 15 portions of steak. (Stip. ¶ 110, BRU0001097) The Rooming List indicates 21 players, 5 coaches, 1 executive, 2 general managers, and 8 support staff on the trip, totaling 37. (Stip. ¶ 138, BRU0001396) Petitioners have not presented invoices for all the pre-game meals at issue, but the pertinent invoice for this Dallas trip states that the hotel computed the lunch charge based on 32 persons at $56.00 per person for a total amount of $ 1,792.00 before taxes and service charges. (Stip. ¶ 117, BRU0002288) Players, coaches, an executive, and the two GMs total 29. Thus, of the remaining 8 staff, five were excluded from eating.

Dallas was not a regular destination for the Bruins. In the case of the game against Philadelphia on October 22, 2009, the

Rooming List names 23 players, 5 coaches, and 1 GM for a total of 29 persons. (Stip. ¶ 138, BRU0001426) The invoice from the Ritz-Carlton for breakfast shows the Bruins were billed for 28 persons at $48.00 per person for a total of $1,344.00 (Stip. ¶ 117, BRU002291). However, the Rooming List reflects that 7 support staff were also on that trip. The entire group of staffers were excluded from eating breakfast although they may have been present in the eating room. (Stip. ¶ 306, GOV00010978).

Respondent has constructed a similar analysis using the hotel agreements and BOE in comparison with the Rooming Lists where petitioners have not presented relevant hotel invoices to show how many persons were fed at the meals. (Stip. ¶306) The most frequent number of travelers (players + coaches + staff, including executives) per the Rooming Lists was 36. The most frequent number of attendees for breakfast/brunch per the invoices (or in the absence of invoice, the hotel agreement or BOE) was 25 (34 instances; 28 attendees at twenty-one (21) instances was the next most frequent). The most frequent number of attendees for lunch was 25 (30 instances; 30 attendees at twenty (20) instances was next). The most frequent grouping of players, coaches, executives, and GMs numbered 29 (25 instances; groupings of 30 and 28 were the next most frequent at thirteen

(13) instances each.) This number 29 does not include any staff that also travelled.

A similar analysis was not undertaken with respect to the pre-game afternoon snack for two reasons. Petitioners acknowledge that attendance at the snack was not mandatory and consistently the expected number of attendees at the snack was less than that for the other pre-game meals, usually an expected number of attendees of 15. (Stip. ¶ 184, 110 BRU00001264; Stip. ¶ 117 BRU00002343, 2348)

A classification that, on its face, makes fringe benefits available principally to highly compensated employees is per se discriminatory. Treas. Reg. § 1.132-8(d)(2). The Rooming Lists in comparison to the number of meal attendees per the documentation, reflects that the pre-game meals (breakfasts & lunches or brunches) are only provided to the players, coaches, executives and GMs, with support staff wholly or proportionally excluded. This is per se discriminatory because the players, coaches, executives, and GMs are highly compensated while nearly all of the excluded Bruins' support staff employees are not highly compensated.

The regulations go on to state, "A classification that is based on factors such as seniority, full-time vs. part-time employment, or job description is not per se discriminatory but

may be discriminatory as applied to the workforce of a particular employer." Treas. Reg. § 1.132-8(d)(2). Petitioners, however, have not argued that BPHA provided the meals based on such factors other than to state that the manner of meal provision promotes team cohesion. Such claim cannot be reconciled with the stipulated evidence that coaches and staff are indeed present in the meal rooms with the players as they eat. By impermissibly precluding those staff present at the meals from eating, BPHA changes one of the terms or conditions governing the availability of a particular benefit in a discriminatory manner to the benefit of highly compensated employees. Treas. Reg. § 1.132-8(c)(1).

Issue 4

I.R.C. § 132(e)(1) defines a de minimis fringe to be any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable. Treasury Regulation § 1.132-6(e)(1) provides examples of de minimis fringe benefits to include:

> occasional typing of personal letters by a company secretary; occasional personal use of an employer's copying machine, provided that the employer exercises sufficient control and imposes significant restrictions

> on the personal use … so that at least 85 percent … is for business purposes; occasional cocktail parties, group meals, or picnics …; … coffee, doughnuts, and soft drinks; local telephone calls; and flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis)

Based on the nature of the pre-game meals in terms of frequency, cost, and record keeping, the cost for away-game meals is not so small as to make accounting for it unreasonable or administratively impracticable

The provision by BPHA of the pre-game meals during regular season play occurs on 41 days, precisely 50% of the games that the Bruins play. In fact, since the pregame meals include breakfasts and lunches (or brunches) and afternoon snacks, the BPHA provides approximately 123 (= 3*41) meals each hockey season commencing in October and ending in April of the following calendar year. With the addition of the few pre-season meals and post-season play, the approximate number of meals shown in the exhibits during 2009 and 2010 reached approximately 230. Thus, merely on the frequency and regularity with which the meals are provided, petitioners fail to meet the "occasional" basis required by the regulation. Treas. Reg. § 1.132-6(d)(2)(A).

Similarly, the value of the meals, aggregating to $255,754 for tax year 2009 and $284,446 for tax year 2010 shows that the expenses under examination are of a magnitude exceeding what the statute contemplated.

Finally, the invoices, hotel agreements and BEOs reflect that the hotels regularly charge for the meals on a per capita basis. BPHA copies those meal costs from the receipts and invoices onto its expense memoranda and records the costs onto its financial account # 534278. The ability of BPHA to credit the away-game meals to its financial account demonstrates its ability to appropriately track the pre-game meal costs.

Issue 5

Petitioners contend that the Bruins "provide[] entertainment to hockey fans who watch the Bruins' games. This entertainment is sold to these fans as part of a bona fide transaction." (Petition ¶ 5.b) Section 274(e)(8) provides an exception to the 50% limitation for "expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth." Treasury Regulation § 1.274-2(f)(2)(ix) provides examples of qualifying expenses by stating, "the cost of producing night club entertainment (such as salaries paid to employees of night clubs and amounts paid to performers) for sale

to customers or the cost of operating a pleasure cruise ship as a business will come within [the section 274(e)(8)] exception."

Petitioners' situation is markedly different from the examples in the regulations. The salaries paid to the players, coaches, and staff are not in dispute in this proceeding, only the meal costs. Similarly, the meal costs incurred by the Bruins are not costs of entertainment provided by the Bruins in the same venue where Bruins' customers are co-located as on a pleasure cruise or night club. In fact, it is the failure of petitioners' to demonstrate that the meal costs were incurred "for goods or services … which are sold by the taxpayer in a bona fide transaction" which removes petitioners from the ambit of I.R.C. § 274(e)(8).

The Bruins provide entertainment. However, in order to find relief under § 274(e)(8), the costs of that entertainment need to be incurred as part of a bona fide sales transaction. While performing regular season away games, the Bruins, pursuant to the NHL Constitution, receive no share of the ticket receipts. According to BPHA's certified financial statements, the only revenues from sales transactions are listed as merchandise sales, presumably arising from BPHA's ownership and operation of the store in Boston.

In the prior tax abatement matter before the Commonwealth of Massachusetts, the petitioners and BPHA argued that the Commonwealth was in error to tax 100% of the Bruins' 1991-1994 ticket revenues since the team played games in other states and Canada, foreign jurisdictions to Massachusetts. The petitioners asserted that while not sharing in the gate receipts when away games were played, consideration was received in the form of a consequent obligation of the opposing team to play a game in Massachusetts. Petitioners' assertion on this matter was rejected by the ATB whose decision was affirmed by the Supreme Judicial Court of Massachusetts which determined that the obligation of an opposing team to play in Massachusetts arose as a result of the NHL Constitution, not from the play by the Bruins of an away game. Boston Professional Hockey Association, Inc., vs. Commissioner of Revenue, 820 N.E.2d 792, (Mass. 2005), 443 Mass. 276, 287 (Oct. '04-Jan. '05) affirming in part and vacating & remanding in part a determination by the ATB.

The only other named revenues per the financial statements were described as broadcast revenues. The Bruins receive broadcast revenues pursuant to licenses it has extended to broadcasters either directly as, for example, with the NESN, or through the NHL. The viewing hockey fans are the customers of those applicable broadcasters, not sales customers of the Bruins.

The absence of paying customers similarly provided grounds to deny the taxpayer exception under §274(e)(8) for its meal and entertainment expenses in the case of Churchill Downs, Inc. v. Commissioner, 115 T.C. 279, 280 (2000) aff'd, 307 F.3d 423, 429 (6th Cir. 2002). Such holding was in the alternative to the main holding in that case. The taxpayers therein conducted live horse races at their facilities. Along with large events like the Kentucky Derby, the taxpayers had held several invitation only events for selected horsemen, employees, media officials, and local dignitaries to make the Kentucky Derby more prestigious and heighten public awareness. The Tax Court concluded that although the invitation-only side events were providing some benefit in raising public awareness for the horse races, they were more akin to public relations expenditures than expenses connected with providing specific information to the customers of the taxpayers.

Putting aside the failure to demonstrate that BPHA's costs were incurred in a sales transaction, petitioners have argued that the full costs for the meals for the team should nevertheless be expensed similar to the feed costs for circus animals or race horses. Petitioners' analogy is flawed not only because of the dissimilarity of animals and professional athletes. By failing to recognize the ordinary and personal nature for meals that individuals consume (i.e. an ordinary cost

of living), petitioners would disregard the entire foundational aspects for why meal costs are inherently suspect and subject to the additional scrutiny manifest by the Code.

Even if petitioners substantiate that the away game meals may have been provided for the convenience of BPHA, the need for provision by BPHA of such meals is uncertain. First, petitioners contend the meals were available to the entire travelling group, players, coaches, and support staff. If so, petitioners have not substantiated why such meal provision to staff would be ordinary or necessary. Next, breakfasts and brunches consist of scrambled eggs and bacon. Lunches couple excess servings of steak, fish, and chicken with ice-cream and cookies. As for the afternoon snacks, petitioners even concede those meals are not even mandatory. (Respondent has not conceded that any pre-game meals are mandatory.) Even while in Boston, the game day breakfast is left up to the discretion of the players. Such varying meal fare and discretionary need for the snacks undermine the ordinary and necessary nature of the costs. For these reasons section 274(e)(8) does not apply because the expenses for the pre-game meals for away games are not an ordinary and necessary expense directly related or incurred for the production of the away hockey games. While the Commissioner accepts that the meal expenses at issue were ordinary and necessary business expenses,

and hence subject to § 274(n)(1), the meal expenses at issue are no more a cost of entertainment production under § 274(e)(8) than the meals at issue in Moss were business related.

Arguably, petitioners occupy the same position as the taxpayers in Boyd Gaming Corp. v. Commissioner, 106 T.C. 343, 344 (1996). In that matter the taxpayers had provided free meals to their casino employees on their business premises, and in a motion for summary judgment, they asserted that they were entitled to deduct 100% of the meal expenses pursuant to I.R.C. § 274(e)(8). In support, the taxpayers argued that they sold the meals to the employees in consideration for the employees' services and the employees' promises not to leave the business premises during breaks. Id. at 354. The Tax Court rejected their argument, stating,

> [W]e do not believe that petitioners sold the meals to their employees in a bona fide transaction for adequate and full consideration. We believe that petitioners merely presented the meals to their employees in connection with the employees' employment with petitioners. To say the least, we are sure that petitioners' employees would be surprised to hear that they were paying

> arm's-length, fair market value prices for the meals.

Id. at 354. Even were BPHA's provision of the meals at issue herein undertaken as a similar matter of convenience, they were not provided on BPHA's business premises in Boston. Most significantly, however, the meal costs were not incurred in a bona fide sales transaction as required by the statute.

Issue 6

In addition to other limitations, the Code imposes an overall limitation on the amount of deductions a taxpayer may claim as itemized deductions. I.R.C. § 68 limits the amount of itemized deductions to the lesser of 3 percent of the excess of adjusted gross income (AGI) over the applicable amount or 80 percent of the amount of the itemized deductions otherwise allowable for such taxable year. I.R.C. § 68(a). Petitioners' 2009 Form 1040 reported AGI of $17,720,453 and total Schedule A, Itemized Deductions, as limited, in the amount of $1,321,312. (Stip. ¶ 8, Exhibit 2-J)

Prior to the issuance of the statutory notice of deficiency, Petitioners' AGI was increased due to agreed adjustments between Petitioners and the Service. Including those agreed adjustments, and the 2009 unagreed adjustment in the amount of $127,877 determined in the statutory notice, the Commissioner determined

corrected 2009 AGI in the amount of $18,075,398. (Stip. ¶ 2, BRU0002884) Attached to the statutory notice is a Form 886-A, Explanation of Items. On the Form 886-A, Schedule 3, page 4 of 14 for 2009, the agreed AGI was used as the listed "Total itemized deductions per return" is stated in the amount of $1,319,042, reflecting the increased limitation on the deductions from the agreed increase to AGI. (BRU0002887) The text should more correctly have labelled the amount as "Total itemized deductions per return as adjusted." As determined in the statutory notice, the corrected amount of limited itemized deductions for AGI of $18,075,398 is $1,317,763, a difference of $1,279.

Docket No. 19009-15

EVIDENTIARY PROBLEMS:

None anticipated.

Respectfully submitted,

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